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Nos. 07-588, 07-589, 07-597 (Consolidated)

In the Supreme Court of the United States

ENTERGY CORP.,
PSEG FOSSIL LLC AND PSEG NUCLEAR LLC,
AND
UTILITY WATER ACT GROUP,
PETITIONERS,
V.
RIVERKEEPER INC, ET AL.,
RESPONDENTS.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS ENTERGY CORP., PSEG FOSSIL LLC, AND PSEG NUCLEAR LLC

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ARGUMENT

Respondents suggest that Congress intended to mandate "the limits of [what] technology can achieve" to reduce impingement and entrainment "to the lowest level possible," completely without regard to costs or other competing priorities. Respondent States Br. ("States Br.") 18, 24. The plain language of §316(b) does not require that interpretation and it is wholly implausible. The Clean Water Act ("CWA" or "Act") *requires* EPA to compare costs with benefits in numerous effluent provisions directly affecting not just fish but human health, and where the Act's stated goal is the *complete elimination* of all pollutant discharges. By contrast, §316(b) requires only the "best technology available" ("BTA") "for minimizing adverse environmental impact," 33 U.S.C. §1326(b), and every other provision of the Act expressly governing fish describes the goal it sets as the maintenance of a "balanced population."

Respondents and their *amici* criticize a mode of decisionmaking they call "formal cost-benefit analysis," which, they argue, would require EPA to reject a more environmentally protective technology if the costs exceeded quantifiable monetary benefits by even a dollar. This is a red herring. EPA considered both quantifiable and qualitative costs and benefits and, in recognition of the scientific uncertainties respondents point to, left a substantial thumb on the scale for environmental protection. *See* UWAG Reply Br. 6-7, 30-35. For example, EPA's final rule adopted performance standards whose estimated annual costs exceeded quantified benefits by nearly five-to-one ($389.2 million to $82.9 million). Pet.App.526a (69 Fed.

Reg. at 41,666).[1] EPA also authorized site-specific variances only if costs are "significantly greater than" benefits. Pet.App.249a-51a (69 Fed. Reg. at 41,603-04; Pet.App.559a (40 C.F.R. §125.94(a)(5)(ii)). The issue in this case is whether EPA can compare costs and benefits *at all*. Riverkeeper effectively concedes that it can, by recognizing that the word "minimize" is flexible enough to permit EPA to decide that additional reductions in impingement and entrainment are "so minor as to be unnecessary." Riverkeeper Br. 29. And once the door to cost-benefit comparisons is opened, there is no persuasive basis for distinguishing between respondents' preferred *de minimis* test, EPA's traditional "wholly disproportionate" test, and the "significantly greater than" test established in the Phase II Rule for site-specific determinations of BTA. On the details, EPA is entitled to deference.

Respondents' position rejects key elements of the Second Circuit decision they ask this Court to affirm; it is internally inconsistent; and it contravenes the statutory, legislative, and linguistic evidence. It ignores the quarter century of precedent concerning deference to agencies since *Chevron*, repeatedly assuming that Congress's failure to command cost-benefit analysis is equivalent to a congressional prohibition. And it ultimately rests on the exceedingly unlikely notion that Congress chose to protect only a "balanced population" of fish from pollution or a cooling system's discharges of heated water, but intended to protect as many fish as financially possible from the *very same* cooling system's intakes of water, regardless

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[1] "Pet.App." refers to the Appendix to the Petition for Certiorari filed by Entergy Corp. in No. 07-588.

of the relationship of benefits to costs, even to the point of replacing the entire cooling system.

Respondents strain to manufacture a dispute between the United States and Petitioners, but the distinction between step one and step two of *Chevron* is paper thin in this case. Petitioners believe the statute delegates broad discretion to EPA. The United States suggests that the statutory language does not constrain the discretion EPA naturally possesses. Either way, the decision below must be reversed or, at a minimum, vacated.

I. THE WORDING OF §316(b) IS CONSISTENT WITH COST-BENEFIT ANALYSIS

A. Respondents Misconstrue §316(b)'s Language

Respondents break with their prior argument by forthrightly disavowing the Second Circuit's plain statement rule that "'[w]hen Congress has intended that an agency engage in cost-benefit analysis, it has *clearly indicated such intent on the face of the statute*.'" Pet.App.25a (citation omitted) (emphasis added); *compare, e.g.*, Riverkeeper Br. 41-42 *with* Riverkeeper Cert. Opp. 26 (arguing that the Second Circuit correctly placed great "weight" on "Congress's conspicuous failure to authorize cost-benefit analysis"). Respondents' reluctance to carry the Second Circuit's water on this point is understandable, but without its interpretive presumption they must find an unambiguous intent to foreclose cost-benefit analysis in the language and structure of the CWA itself.

Petitioners, the United States, and their *amici* demonstrated that, as a matter of both dictionary definitions and common usage, the "best technology

available for minimizing adverse environmental impact" is not necessarily the technology that impinges or entrains the fewest fish without bankrupting the industry. That phrase is naturally susceptible to a reading that leaves room for EPA to acknowledge competing values, including the relationship between costs and environmental benefits.

Respondents do not deny that petitioners' interpretation of the key terms finds support in dictionary definitions. They instead claim that their preferred definitions are listed earlier in the dictionary. *See* Riverkeeper Br. 23-27; States Br. 26-31. But every dictionary definition is sometimes the "best," or at least a correct, meaning in context. Respondents tellingly never cite any authority for their novel and mechanical approach to statutory interpretation. Furthermore, "it is axiomatic that [the agency's] interpretation ... need not be the best one by grammatical or any other standards." *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988); *see also Knight v. Comm'r*, 128 S. Ct. 782, 789 (2008) (adopting definition of "would" listed eighth and last in *American Heritage Dictionary* 1984 (4th ed. 2000) ("*American Heritage*")); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2510 (2007) (adopting definition "11a" for "strong"). And "[t]he existence of alternative dictionary definitions ... each making some sense under the statute, itself indicates that the statute is open to interpretation." *Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 418 (1992).

- ***"Best"***

Respondents argue that the first definition of "best" in the American Heritage Dictionary is "surpassing all others in excellence." Riverkeeper Br.

24 (citing *American Heritage* 173). But the common, more flexible meaning invoked by petitioners—"[m]ost satisfactory, suitable, or useful"—is listed *second*. *American Heritage* 173. And respondents have no answer to the Black's Law Dictionary explanation that "'the "best bid" of interest by a prospective depository of school funds would not necessarily be the highest bid,'" but, after considering other relevant factors, "'might be the lowest bid.'" Entergy Br. 33-34 (quoting *Black's Law Dictionary* 160 (6th ed. 1990)).

Respondents also have no answer to the fact that Congress obviously used "best" in its broader, more flexible sense throughout the CWA. Congress *mandated* cost-benefit analysis under both the "best practicable control technology currently available" ("BPT") and "best conventional pollutant control technology" ("BCT") standards. Both begin with "best" and contain no other words that limit or qualify its meaning. "Practicable," for example, is the functional equivalent of "available" in §316(b), not a modification of the meaning of "best."[2] "Best" is the *only* operative adjective in the BCT standard, where Congress *mandated* cost-benefit analysis.[3] Of course petitioners contend that every "best technology"

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[2] "Practicable" does not have *any* definitions that would authorize cost-benefit comparisons in the face of an interpretation of "best" that would preclude them. "Practicable" means "*[c]apable* of being effected, done, or put into practice; feasible." *American Heritage* 1377 (emphasis added). And the "best available demonstrated control technology" ("BADT") standard, which respondents say *forbids* cost-benefit analysis, also uses that term.

[3] "Conventional" modifies "pollutant" and "conventional pollutants" are set out in 33 U.S.C. §1314(a)(4).

standard under the CWA at least permits EPA to engage in cost-benefit balancing. *See* Entergy Br. 38-42. Respondents disagree as to the "best available technology economically achievable" ("BAT") and BADT standards, but cannot deny that Congress expressly authorized EPA to consider *some* criteria other than maximum pollution control. The Act *always* allows EPA to designate a technology as "best" even if it is not the technology "surpassing all others" in achieving the Act's declared goal of eliminating all pollutant discharges.

While respondents suggest it would be absurd to read "best" to give EPA discretion to select a technology "based on whatever factors it deems proper," Riverkeeper Br. 23-24, Congress three times expressly gave EPA authority to consider "such other factors as [EPA] deems appropriate" for "best ... technology" standards, including BAT. *See* 33 U.S.C. §1314(b)(1)(B), (b)(2)(B), (b)(4)(B). Respondents also largely ignore the case law establishing that Congress intended "best" to mean "acceptable on the basis of numerous factors, only one of which is pollution control." *BP Exploration & Oil, Inc. v. EPA*, 66 F.3d 784, 796 (6th Cir. 1995)).[4] And respondents completely ignore the D.C. Circuit's landmark decision in *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978). As previously explained, the D.C. Circuit recognized that Congress gave EPA broad discretion to consider multiple criteria, including costs and

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[4] Riverkeeper ignores *BP Exploration*, while the States distinguish its clear holding as irrelevant *dicta*. States Br. 28 n.17. In fact, the Sixth Circuit's cost-benefit holding was essential to affirming EPA's standard. 66 F.3d at 796-97.

benefits, and that the salient difference between BPT and BAT is that Congress *mandated* cost-benefit analysis for BPT as a "comparison factor" whereas BAT gives EPA broad discretion to consider all criteria however it wishes, as permissive "consideration factors." *Id.* at 1045 (for BAT "[a]ll factors, including costs and benefits, are consideration factors."). Thus, the CWA "on its face lets EPA relate the various factors as it deems necessary," rather than imposing *any* congressionally-mandated limitations. *Id.* at 1046.[5]

Respondents likewise fail to confront the Second Circuit's decision in *Riverkeeper I*, which interpreted "best" and "minimize" *in §316(b)*. That court concluded that §316(b), like §§301 and 304, gave EPA "'considerable discretion to weigh and balance the various factors,'" including costs and benefits. *Riverkeeper, Inc. v. EPA*, 358 F.3d 174, 195-96 & n.22 (2d Cir. 2004) (citation omitted). Indeed, the court upheld EPA's rejection of a dry cooling requirement on the basis of cost-benefit analysis, even though dry

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[5] On respondents' side, only *amicus* Environment America addresses this analysis in *Weyerhaeuser*—and they implausibly disregard its extensive discussion, *see* 590 F.2d at 1045-46, as "loose language" and "*dicta*." *See* Envt. America Br. 27 n.22. Although Environment America suggests *Weyerhaeuser* held that "Congress rejected the optimal pollution theory," *id.* at 12, the D.C. Circuit merely observed that it "*appears that* Congress *doubted* these premises." 590 F.2d at 1041 n.41 (emphasis added). It did so only in rejecting the extraordinary argument that ocean dumping could be *categorically excluded* from effluent limitations. *Id.* at 1041-44. In addition, because both costs and benefits are "consideration factors," Environment America's reliance on *ejusdum generis* and *Hughey v. United States*, 495 U.S. 411 (1990), is misplaced. *See* Envt. America Br. 18-19.

cooling "is certainly ... an available technology, ... [and] 95 percent more effective than closed-cycle cooling." *Id.* And while even respondents are apparently unwilling to argue that dry cooling retrofits should be required, they provide no reason why their interpretation would not mandate it.

- *"Minimize"*

Respondents apparently have no response to the American Heritage Dictionary's usage note on "minimize," which explains that the phrase "minimize the risk of accidents" should *"naturally"* and *"quite often"* indicate that "considerations of efficiency and cost are taken into account." *American Heritage* 1119 (emphasis added). That broader meaning of "minimize" is definition 1b—hardly "rarified and unlikely use[] of language." *See id.*; Riverkeeper Br. 24-26. *Compare* Riverkeeper Br. 25 (quoting definition 1a and arguing "ordinary definition" of minimize is "not simply 'to reduce'") *with American Heritage* 1119 (providing, as definition 1b, "to reduce").

Respondent States suggest (at 30) that a pedestrian seeking to "minimize" the risk of being struck by a car would "use every precautionary measure available to her." But a reasonable pedestrian would not build a multi-million dollar footbridge, rent an armored car, or even wait to cross in the dead of night to avoid traffic. In common parlance a pledge to "minimize" risk almost always implies some balance of safety and other important criteria, such as cost, convenience, and leisure.[6]

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[6] Respondents also rely heavily on EPA's definition of "minimize" in its 1976 rule, but that rule was vacated. Riverkeeper Br. 25, 43-44; States Br. 19-20, 29. Soon thereafter,

Once again, Congress used the more flexible sense of "minimize" *within the CWA itself*, by requiring the "drastic minimization" of paperwork. Respondents' definition would require the total elimination of paperwork and would render the word "drastic" nonsensical. *See* Entergy Br. 35. Respondents' maximalist interpretation of "minimize" also conspicuously ignores Congress's deliberate choice to use "minimize" in §316(b) instead of "eliminate," which is the explicit goal of §301 standards. *Id.* at 36-37.

- ***"For"***

Respondents also fail to engage genuinely with Congress's use of the phrasing "best for" instead of "best at" within §316(b), and would treat them as synonymous. But the best strategy *for* minimizing investment risk is not necessarily the best strategy *at* minimizing investment risk (*i.e.*, the strategy that reduces risk the most). Respondent States wrongly argue (at 27-28) that such examples "fail[] to acknowledge that the specifications of the particular job are relevant." Of course the specified task is relevant, but the preposition "for" makes more room for balancing objectives other than single-minded maximization of that task—the best person "at" a job is not the best person "for" a job if exorbitant salary demands outweigh any increase in efficiency.

Respondent States suggest (at 26-27) that the "best" method "for arriving home as quickly as

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EPA began interpreting §316(b) to permit cost-benefit analysis, and continued doing so for three decades. EPA's current (and long-held) interpretation is entitled to deference. *See* Entergy Br. 57-58 & n.25; *see also* UWAG Reply Br. 31-32 (discussing other flaws in respondents' reliance on 1976 rule).

possible" is necessarily the absolute quickest route. But §316(b) contains nothing like that "as possible" modifier. And any ordinary person committing to follow the "best" route for "minimizing" travel time would balance speed against costs, such as expensive tolls, the inconvenience of carpooling for HOV lane access, or the risks associated with driving through a dangerous area.

- ***"Adverse Environmental Impact"***

In any event §316(b) requires the best technology "for *minimizing adverse environmental impact*," not for eliminating impingement and entrainment. Nothing in the statute suggests that Congress thought the loss of every fish or plankton was itself an "adverse environmental impact." And saving every fish is *not* the goal of the CWA, as the *amicus* participation of the Commercial Fishermen of America *et al.* amply demonstrates. Although the CWA boldly declares a national goal of the complete "elimination" of pollutant discharges into navigable waters, its goals for aquatic life are repeatedly described in very different terms. Congress sought to protect a "balanced population"—not every fish. *See* 33 U.S.C. §§1311(g)(2)(C), 1311(h)(2), 1314(a)(5)(A), 1314(a)(5)(B), 1314(*l*)(1)(A), 1326(a). And the variance mandated in §316(a) for thermal discharges that do not threaten a "balanced, indigenous population of ... fish" indicates that Congress was *not* concerned about the consequences of once-through cooling systems on individual fish. 33 U.S.C. §1326(a). EPA could have concluded that the "adverse environmental impact" of a cooling system *intake* is effectively "minimized" if it protects that balanced population of fish. EPA should not lose the broad discretion Congress obviously intended just

because the agency chose to frame this Rule in terms of reducing impingement and entrainment losses. *See Chem. Mfrs. Ass'n v. NRDC*, 470 U.S. 116, 120, 133 (1985) ("*Chem. Mfrs. I*") (recognizing EPA's discretion to "temper[] with ... flexibility" its "necessarily rough-hewn" framework).

B. Respondents' Exceptions Are Internally Inconsistent And Do Not Remedy The Unreasonable Consequences Of Their Position

Respondents' textual argument is also at war with itself, because they feel compelled to introduce significant flexibility into their absolutist reading of §316(b) in order to mitigate its most extreme consequences. That endeavor is inconsistent with respondents' basic theory and is ultimately unsuccessful in resolving the absurd consequences of their interpretation.

Respondents adopt two starkly different methods of interpretation within the 46 short words of §316(b). While giving "best," "for," and "minimize" the strictest possible meanings, respondents adopt a strikingly flexible definition of "available."[7] Departing from their "earlier-listed" approach to dictionary definitions, respondents acknowledge that "available" in §316(b)

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[7] Respondents also must adopt a flexible meaning of "location, design, construction and capacity of cooling water intake structures" to support their argument below that closed-cycle cooling can be required in a §316(b) permit. Cooling towers are a wholly *separate* structure from the intake structure, and thus fall within the ambit of §316(b) only by interpreting those terms very loosely. *See* J.A.59-60 (decision of EPA General Counsel stating same).

cannot possibly have its primary dictionary meaning—*i.e.*, "[p]resent and ready for use; at hand; accessible." *American Heritage* 123. Instead, respondents concede that "available" has "potential ambiguity ... extend[ing] beyond physically available to include economically available [and] ... economic feasibility." Riverkeeper Br. 26-27. Respondents would, in effect, insert the word "reasonably" in front of "available." The common usage of "available" is certainly flexible enough to embrace that meaning. But applying even a fraction of that flexibility to any of "best," "for," or "minimize" would compel a conclusion that §316(b) is at least ambiguous. And why would Congress have given EPA substantial leeway to decide how much technology the industry can reasonably afford (*i.e.*, what technology is "available") (*see* Pet.App.26a), and essentially *no* leeway to consider the benefits side of the equation?

Respondents also argue that EPA may choose a less expensive technology if the benefits foregone would be *de minimis*. As Riverkeeper acknowledges (at 29), that authority must necessarily come from some additional flexibility or ambiguity in the word "minimize." Riverkeeper argues that "[a]lthough the meaning of 'minimizing' is plainly not merely to reduce, *it is just as plainly not so constricted as to require EPA to require industry petitioners to spend billions to save one more fish or plankton*," and that "the Agency has some discretion (albeit not boundless) to determine that further differences in reduction would be so minor as to be unnecessary." *Id.* (emphasis added).

Riverkeeper's "*de minimis*" exception is inconsistent with the Second Circuit's "cost

effectiveness" test, which would not permit EPA to select a technology saving "99-101 fish" if industry could bear the cost of technology saving "at least 102 fish." Pet.App.26a-28a. It also plainly envisions cost-benefit comparisons. If this *de minimis* exception is *not* a form of limited cost-benefit analysis, but instead merely a principle that additional benefits can be disregarded whenever they are small *without reference to cost*, then it makes no sense. Why forego small additional gains that could be secured at even smaller additional cost? Riverkeeper's allowance that EPA could conclude a "reduction would be so minor as to be unnecessary" also necessarily concedes that EPA can assign a value to further reductions in impingement and entrainment. Otherwise there would be no way to evaluate whether small improvements are "unnecessary" or *de minimis*. Indeed, it is impossible to see how a "so minor" test can be applied *without* weighing costs and benefits.

Respondents' *de minimis* exception is therefore also inconsistent with their own rigid assertions that "[t]he statute leaves *no room* for EPA to conclude that [achievable] benefits are not worth the costs." Riverkeeper Br. 27 (emphasis added). The statute is obviously flexible enough to permit some cost-benefit comparisons, and the appropriate threshold is a matter for EPA's expert discretion.[8] *Cf. Chem. Mfrs. Ass'n v.*

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[8] Respondents struggle to argue that EPA's long-standing "wholly disproportionate" standard is substantively no different than their *de minimis* exception. As demonstrated in UWAG's opening brief, that contention is inconsistent with three decades of permitting history. *See* UWAG Br. 15-16, 40-41. And in *Seacoast Anti-Pollution League v. Costle*, the First Circuit upheld EPA's decision that the costs of moving the intake even further offshore would be "'wholly disproportionate to any environmental benefit.'"

EPA, 870 F.2d 177, 225 (5th Cir. 1989) ("*Chem. Mfrs. II*") (recognizing "that complex scientific and technical issues" involved in weighing costs and benefits under CWA §301(n) "should be resolved in the first instance by the EPA, the entity best suited to pass on these issues"), *cert. denied*, 495 U.S. 910 (1990).

Furthermore, respondents' *de minimis* exception does not solve the absurd consequences of their interpretation. Even non-trivial levels of impingement and entrainment may have no ecological consequences that are remotely worth massive technology costs—if, for example, the species affected are extremely prolific or are invasive nuisance species targeted by state regulators. *See* UWAG Br. 7-11; UWAG Reply Br. 11 n.6.

Respondents suggest that broader consideration of environmental impacts beyond impingement and entrainment will also mitigate any absurdities. Riverkeeper Br. 28-29. The opposite is true. If EPA is required to "minimize," to the maximum extent technologically possible and completely without regard to costs, *every* far-flung environmental consequence associated with the location, design, and construction of cooling water intake structures, there is no end to the mischief this statutory "afterthought" will inflict. *See* Entergy Br. 50-51.

Respondents completely fail to address the "Sisyphean" consequences associated with the fact that §316(b) determinations are revisited during each permitting cycle. *Id.* at 51-52. As long as technological advances were not *de minimis*, respondents'

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597 F.2d 306, 311 (1st Cir. 1979) (citation omitted). Neither EPA nor the First Circuit suggested that the benefits of moving the intake would be *de minimis*.

interpretation could force facility operators to tear out and rebuild massive (and massively expensive) intake and cooling structures every five years, completely without regard to costs. Our country has real environmental priorities, and Congress could not possibly have intended to squander limited resources on such an absurd merry-go-round.

All told, while the Second Circuit's "cost-effectiveness" test had no textual basis and is defended by no one, at least its "99-101 fish"/"102 fish" rule was comprehensible. Respondents' interpretation, on the other hand, is an internally inconsistent smorgasbord of platitudes and *legalpolitik*. Clearly, the plain meaning of the few words in §316(b) is not the edifice constructed by respondents, leaving §316(b), at a minimum, ambiguous.

II. THE STRUCTURE AND HISTORY OF THE CWA SUPPORT PETITIONERS' READING

A. The Other Provisions Cross-Referenced In §316(b) Support, And Certainly Do Not Preclude, Cost-Benefit Analysis Under §316(b)

Respondents once agreed that the decisional framework Congress established for the other "best technology" standards in the CWA should inform the proper interpretation of §316(b). *See* Entergy Br. 38 & n.14. Now they back away and emphasize §316(b)'s uniqueness. *See* States Br. 32; Riverkeeper Br. 37 n.19. But whether the similarities or the differences are emphasized, the overall structure of the CWA supports EPA's authority to consider costs and benefits under §316(b).

Respondents' principal argument is that the BAT and BADT standards should be interpreted to prohibit all cost-benefit comparisons after 1977, because Congress wanted to shift the regulatory focus away from "water quality" toward eliminating all pollutant discharges. But §316(b) states a different goal, framed in terms of "adverse ... impact" on the "environment[]," which must include the waterbody itself. 33 U.S.C. §1326(b). Even if the CWA's general trend away from consideration of water quality as a preferred basis for regulation of discharges were taken to be inconsistent with cost-benefit comparisons, §316(b) is a conspicuous *exception*. As Respondent States concede (at 37), under "section 316(b), the impact on fish and wildlife is the paramount concern." Congress's use of the far more flexible word "minimize" instead of "eliminate," and the requirement that intake structures merely "reflect[]" BTA rather than "appl[y]" it, underscores §316(b)'s uniqueness. *Compare* 33 U.S.C. §§1311(b)(1)(A), (b)(2)(A), (b)(2)(E), 1316 (requiring "application" of BPT, BAT, BCT, and BADT) *with* 33 U.S.C. §1326(b). Respondents' principal arguments therefore simply have no purchase on §316(b)'s unique terms.

Respondents also never provide any convincing explanation for why, if analogies are to be drawn, EPA must analogize §316(b) to BAT or BADT rather than to BPT, BCT, or §316(a). *See* Entergy Br. 44-46. Respondents acknowledge, for example, that the other provisions directed at water quality objectives generally do permit cost-benefit balancing. *See* Riverkeeper Br. 37-38 (discussing §302, 33 U.S.C. §1312, reproduced in addendum hereto); *see also* §316(a). Respondents ignore the fact that the rest of

the CWA demonstrates *zero* desire on Congress's part to protect every possible fish without regard to its environmental significance. Respondents' absolutist interpretation would turn §316(b) into a radical outlier, requiring massive expenditures to save every possible fish from impingement and entrainment regardless of cost when the rest of the Act expressly tolerates the impacts to individual fish (by, for example, conventional or thermal pollution) so long as a "balanced population" is maintained. *See* Entergy Br. 44-46; *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must ... interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into an harmonious whole.'") (citations omitted).[9] And respondents note that the BPT provision was originally designed to sunset and be replaced by BAT in 1983, but never explain why that makes BAT a better guide for interpreting §316(b)—which took effect in 1972.

If this Court chooses to reach the proper interpretation of the BAT and BADT standards, it should hold that they leave EPA discretion to compare costs and benefits. Respondents call that interpretation "extraordinary" and a "radical notion," Riverkeeper Br. 35-36, but it is the holding of the leading court of appeals case. *See Weyerhaeuser*, 590 F.2d at 1045-46.

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[9] Respondents' interpretation becomes even more implausible when other statutes are considered. For example, Congress has *mandated* cost-benefit analysis under the Safe Drinking Water Act, 42 U.S.C. §300g-1(b)(3)(C). *See Branch v. Smith*, 538 U.S. 254, 281 (2003) (courts must interpret statutes "in the context of the *corpus juris* of which they are a part, including later-enacted statutes").

Respondents believe that because Congress expected the BAT and BADT effluent standards to be more stringent than those adopted under BPT, there must be some judicially enforceable hook in the statute to hold EPA to that expectation—such as an implicit complete ban on cost-benefit comparisons. But this Court has recognized that BAT is only "*potentially* more technology-forcing" than BPT. *Chem. Mfrs. I*, 470 U.S. at 128 n.18 (emphasis added). Congress was entitled to trust that the agency specifically constituted to protect the environment would believe in that mission. Indeed, it has exempted EPA from most of the procedural requirements of NEPA for precisely that reason. *See, e.g.*, *Weyerhaeuser*, 590 F.2d at 1051-52 ("In essence, Congress was convinced that EPA's internal dynamics and procedures were the 'functional equivalent' of the NEPA duties imposed on other agencies."). And the statutory goal requiring continual progress toward the elimination of all pollutants provides a more than sufficient framework for ensuring that BAT would be more stringent than BPT, without inventing a prohibition on all cost-benefit comparisons that would be in great tension (at least) with the text, as well as terrible policy.

Contrary to respondents' suggestion that Congress struck all the difficult policy balances itself and merely left the implementation to EPA, this Court has consistently described the CWA as a statute that "envisioned, rather than curtailed, the exercise of discretion." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 316-17 (1982). When Congress has already "decided the order of priorities" and mandated an outcome "whatever the cost," federal courts lack their traditional equitable powers. *TVA v. Hill*, 437 U.S.

153, 184-88, 193-95 (1978). This Court held the opposite is true under the CWA in *Weinberger*. This Court's other decisions interpreting the CWA similarly emphasize the broad discretion that Congress gave to EPA. *See Arkansas v. Oklahoma*, 503 U.S. 91, 108 (1992) ("[R]ather than establishing the categorical ban ... the [CWA] vests in the EPA and the States broad authority."); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987) (holding state nuisance suits were preempted by CWA where they could interfere with "weighing of the costs and benefits" of another state or EPA); *id.* at 497 (CWA created "process whereby [competing] interests will be considered and balanced by the source State and the EPA"); *Chem. Mfrs. I*, 470 U.S. at 132-33 (holding that EPA's authority to "temper[] [CWA] with ... flexibility" conflicted with "neither the goals nor the operation of the Act").

Against all that authority, respondents repeatedly invoke a single sentence of *dictum* from *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64, 71 (1980), indicating only that cost-benefit analysis is *not required* for BAT. *See* Entergy Br. 41-42. Indeed, *Crushed Stone* recognized as much when it went on to explain that "[BAT] does not state that costs *shall* be considered in relation to effluent reduction." 449 U.S. at 71 n.10 (emphasis added); *see also* Stephen Breyer, *Regulation and Its Reform* 265 (1982) (CWA "leaves to the administrator the definition and application of these terms [BPT and BAT]. The EPA has examined the economic circumstances of the particular industry and firm, *tailoring its standards to prevent obvious*

waste." (emphasis added)).[10] And, in any event, *Crushed Stone* predates *Chevron*, and must be read in light of that later decision on statutory interpretation.

Respondents' emphasis on *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001), simply assumes their conclusion. The Clean Air Act provision in *Whitman* specifically required EPA to set ambient air quality standards "'requisite to protect public health'" with "'an adequate margin of safety.'" *Id.* at 465 (citation omitted). This Court reasonably concluded that EPA could not rely on cost-benefit considerations to set standards that flatly violated that directive. Respondents pretend that petitioners are similarly suggesting that EPA adopt an interpretation of §316(b) that would not require the "best technology available for minimizing adverse environmental impact." But this case is about what that standard *means*, not whether EPA must comply with it. Section 316(b)'s language is substantially more flexible and consistent with cost-benefit comparisons than the provision considered in *Whitman*. *See id.* at 490 (Breyer, J., concurring) ("[W]e should read silences or ambiguities in the language of regulatory statutes as permitting, not forbidding, this type of rational regulation.").

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[10] Similarly, Riverkeeper makes much of Senator Muskie's statement that, in determining BAT, "'the Administrator is *expected* to apply the same principles involved in making the determination of [BPT], except as to cost-benefit analysis.'" Riverkeeper Br. 36 (citation omitted) (emphasis altered). But Senator Muskie clarified his position just a few sentences later when he noted that, with respect to BAT, "'[w]hile cost should be a factor in the Administrator's judgment, no balancing test will be *required*.'" States Br. 40 (citation omitted) (emphasis altered).

Finally, respondents invoke *Russello v. United States*, 464 U.S. 16 (1983), to suggest that the inclusion of cost-benefit language in other CWA provisions means that Congress intended to preclude cost-benefit comparisons under §316(b). That canon is inapposite here. Unlike other CWA technology standards, §316(b) is brief and says *nothing* about the criteria or framework for decision that EPA should use, beyond the bare "best technology" language that, everywhere else in the CWA, provides only a label rather than the substantive content. (BPT and BADT, for example, both include the words "best," "practicable," or "available"—but in respondents' view one mandates, and the other forbids, cost-benefit comparisons.) When a statute erects what is obviously a term of art without any definition, the natural inference is that Congress intended the agency to fill the gap. Section 316(b) is also unique in several ways that militate against applying the *Russello* presumption. *See* Entergy Br. 42-46, *supra* at 16; *Clay v. United States*, 537 U.S. 522, 532 (2003) ("'The *Russello* presumption ... grows weaker with each difference in the formulation of the provisions under inspection.'") (citations omitted).

B. Respondents Misconstrue The Relevant Legislative History

Respondent States admit (at 38) that the legislative history "is sparse and undeserving of *any* significant weight." (Emphasis added.) Riverkeeper agrees that examination of the legislative history is not "necessary for this Court's resolution of the question presented," Riverkeeper Br. 5 n.3, but nonetheless offers an "extensive" but misleading discussion of the legislative history. For reasons explained by UWAG, the handwritten staff notes and other materials that

Riverkeeper unearths from the National Archives are not legitimate legislative history at all, and should be wholly disregarded. *See* UWAG Reply Br. 20-22. Regardless, neither those materials nor the valid legislative history (principally concerning the effluent provisions) remotely support the inferences that respondents attempt to draw.

Respondents claim that "[a] central issue" in the congressional debate was "the extent to which Congress should delegate to EPA the authority to consider and compare costs with benefits in determining technology-based standards." Riverkeeper Br. 7; *id.* at 5 n.3. But, as Riverkeeper's own citations reveal, this "central debate" was not, in fact, about whether EPA should be allowed to weigh costs and benefits. It was about whether the discharge of pollutants should be regulated by water quality standards or by effluent limitations. *See id.* at 8. Riverkeeper argues that technology standards prevailed over water quality standards for CWA provisions governing effluent discharges. But there is no reason why technology-based standards are necessarily incompatible with cost-benefit comparisons, as the BPT and BCT provisions demonstrate. Regardless, Riverkeeper fails to acknowledge that §316(b) is *not* an effluent discharge provision and is framed explicitly in terms of environmental "impact," including impact on the waterbody. *Supra* at 15-16.

As respondents concede, the legislative history of §316 generally reveals that "[t]he House and the Senate were, at the outset, focusing largely on the impact of *thermal discharges*," and not on cooling water intake structures. Riverkeeper Br. 12; *see also* States Br. 41-42. Although Riverkeeper suggests that

Congress shifted its focus, the 25 pages of drafts, memos, and hand-written notes it lodged with the Court collectively contain only *seven sentences* that mention or relate in any way to cooling water intake structures. *See* Riverkeeper Br. 13 n.8 (citing National Archives documents[11]). None establishes any consensus, even among the legislative staff, that cost-benefit comparisons should be precluded. And Riverkeeper has cherry-picked these documents; the weight of the materials contained in the "316 file," and elsewhere at the National Archives, confirm that the conferees remained almost exclusively focused on the thermal discharge issues and hardly discussed intake structures.[12] In sum, the documents stored at the National Archives, if relevant at all, at most confirm the Second Circuit's observation that regulation of cooling water intake structures was the product of an "afterthought."

The debate between the House and the Senate over whether to regulate thermal discharges through water quality standards or effluent limitations ultimately led to the compromise set forth in §316(a)—whereby effluent limitations are required for thermal

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[11] All the National Archives documents discussed herein are located in Cartons 1 and 2 of Accession No. 46-75-003.

[12] *See* Sept. 14, 1972 Staff Memorandum to Senator Muskie (mentioning cooling water intake structures only once in five-page memorandum discussing proposed compromise between House and Senate on thermal discharges); Sept. 13, 1972 Memorandum from Leon Billings to Senator Muskie (discussing details of proposed compromise between House and Senate on thermal discharges without any mention of cooling water intake structures) (both memoranda available in National Archives "Thermal Pollution" file).

discharges, but variances must be granted upon a showing that the limitations are "more stringent than necessary to assure the projection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in and on the body of water into which the discharge is to be made." 33 U.S.C. §1326(a). The absence of such a variance in §316(b) does not establish a conscious decision by Congress to render §316(b) more stringent than §316(a). It is at least as reasonable to infer that Congress thought a separate ecological cost-benefit variance was unnecessary in §316(b), since its core requirement is already stated in terms of ecological "impact." *See* UWAG Reply Br. 22-24, 27-30.

If anything, the conferees' strong focus on thermal pollution, and the variance compromise they adopted in §316(a), demonstrate that Congress considered and squarely rejected the closed-cycle cooling requirement that respondents now seek to impose. As respondents concede, Congress knew about closed-cycle cooling in 1972 as a proven option for reducing thermal discharges. *See* States Br. 7-8 & n.6. Nonetheless, after considerable debate Congress specified that EPA could not force a once-through cooling plant to radically reduce its thermal effluent by retrofitting to a closed-cycle system, unless doing so was necessary to ensure a "balanced population" of fish in the receiving water. A cooling water intake structure is merely the other end of the same system. Riverkeeper's suggestion (at 49) that Congress "compromised" by putting a mandatory ecological variance in §316(a) but requiring maximalist technology-forcing regulation in §316(b) thus makes no sense. It presumes that Congress took away with one hand what it had just given with the other. The fact that Congress phrased §316(b) in terms of "intake

structures" rather than "cooling systems" further confirms that it did not intend for §316(b) to mandate closed-cycle cooling through the back door.

Finally, even respondents concede that the CWA nonetheless "allowed for some 'limited cost-benefit analysis'" for effluent discharges. *See* Riverkeeper Br. 12 (citation omitted). It is unreasonable to think that a Congress implacably opposed to any consideration of water quality would have allowed—and, in some cases, required—EPA to weigh costs and benefits under the provisions governing effluents but not under §316(b), which expressly *requires* EPA to examine and evaluate the local environmental "impact" of relevant technologies.

C. The Structure And Evolution Of The Act Contradict Respondents' Arguments

Respondents also improperly deride the significance of the 1977 and 1982 Amendments, which *required* EPA to weigh costs and benefits for conventional pollutants, and authorized EPA to set less stringent standards for all but the most toxic of non-conventional pollutants as long as those standards were sufficient to ensure "'protection and propagation of a balanced population of shellfish, fish, and wildlife.'" Entergy Br. 10 (quoting 33 U.S.C. §1311(g)(2)(C)). Those amendments made clear Congress's intent both (1) to define "best technology" as that which is economically proportionate to the benefits received for all but the most toxic pollutants, and (2) not to require extraordinary measures on behalf of individual fish. It defies reason that Congress would not have wanted EPA similarly to weigh costs and benefits in determining the best technology available for cooling water intake structures under §316(b).

Respondents argue that the 1977 and 1987 amendments are irrelevant because "the question in this case is what Congress intended *in 1972*, when it enacted Section 316(b), and not in later years." Riverkeeper Br. 39-40; States Br. 36. Of course, even the 1972 version of the statute clearly authorized cost-benefit comparisons extending beyond 1977 in provisions that (like §316(b)) frame their objectives in water-quality terms. *See* 33 U.S.C. §§1312, 1326(a). Regardless, the meaning of §316(b) may be informed by subsequent amendments to the Act. *See, e.g., Dada v. Mukasey*, 128 S. Ct. 2307, 2308 (2008) ("In reading a statute, the Court must not 'look merely to a particular clause,' but consider 'in connection with it the whole statute.'") (citation omitted); *Brown & Williamson*, 529 U.S. at 143-44 (interpreting statutory language in light of six subsequent enactments because "subsequent acts can shape or focus [the act's] meanings"). The fact that Congress saw no need to amend §316(b) at the same time it amended the effluent provisions (including the toxic effluent provisions) confirms Congress's initial understanding, as applied by the EPA at the time of these amendments, that the language of §316(b) never required unreasonable expenditures on behalf of aquatic life. And the Act read as a whole plainly confirms that Congress, if it ever did ascribe to the maximalist "no fish left behind" position advanced by the Second Circuit and Respondents, has long since abandoned it in favor of reasonable regulation on behalf of balanced populations of aquatic life.

III. THIS COURT SHOULD REINSTATE THE PERFORMANCE STANDARDS AND COST-BENEFIT VARIANCE

Riverkeeper contends that the national performance standards and the cost-benefit variance cannot be upheld even if this Court holds that the Second Circuit erroneously concluded that EPA could not compare benefits with costs under §316(b). Riverkeeper argues that the Second Circuit vacated these portions of the rule on grounds not fairly included within the question presented. Riverkeeper is incorrect.

First, as to EPA's national performance standards, Riverkeeper argues that the ranges used by EPA were inappropriate because they "allowed facilities fully capable of achieving performance near the upper end of the range to choose technology to meet only the lower end." Riverkeeper Br. 31 n.16. But the Second Circuit's reasoning was dependent on the same inflexible reading of "best" at the core of its cost-benefit holding. *See* Pet.App.43a (relying on "Congress's use of the superlative 'best'" to hold that "[t]he statutory directive requiring facilities to adopt the *best* technology cannot be construed to permit a facility to take measures that produce second-best results" (emphasis in original)). And because the meaning of "best" within §316(b) is both ""essential' to the analysis' of the decisions below" and "essential ... 'to the correct disposition of the other issues' ... [it is] 'fairly comprised' by the question presented." Eugene Gressman et al., *Supreme Court Practice* 457 (9th ed. 2007) (collecting cases). Petitioners are not attempting to "smuggle additional questions into [this] case," *Norfolk S. Ry. Co. v. Sorrell*, 127 S. Ct. 799, 805 (2007),

since, unlike *Sorrell*, the meaning of "best" is "fully presented" in the question *certiorari* was granted upon, *id.*

Moreover, Riverkeeper concedes the crucial point by arguing that nothing "compels EPA to establish its BTA standards as precise single-number limitations without any flexibility or margin of error," and that the "minimization requirement ... can be satisfied by a reduction within a prescribed range or, presumably, by not harming more than a prescribed amount." Riverkeeper Br. 29, 31. Riverkeeper's gloss would eviscerate the usefulness of national performance standards stated as ranges, by requiring individualized evaluation of every plant's capability *without regard* to highly localized water quality and benefits. *Compare, e.g., Weyerhaeuser*, 590 F.2d at 1040 (noting "liberality that is already built into the system" by performance standards based on "the range of impacts considered by the Agency for the industry generally.")

Riverkeeper also argues that the performance ranges were vacated for inadequate explanation, apart from the permissibility of cost-benefit analysis. Riverkeeper Br. 53 n.24. But the Second Circuit simply held that it could not determine whether EPA used cost-benefit analysis or simply "misunderstood or misapplied cost-effectiveness analysis." Pet.App.36a-37a. In other words, EPA failed to anticipate and explain why its standards would be consistent with the Second Circuit's convoluted "99-101 fish" versus 'at least 102 fish" distinction. Pet.App.26a-28a. EPA's alleged failure to explain "'how [it] determined that the cost of closed-cycle cooling could not be reasonably borne by the industry' ... '[and that its] suite of technologies "approach[es]"'" closed cycle cooling,

Riverkeeper Br. 54 n.24 (citation omitted), both assume requirements that do not exist if EPA has authority to consider the relationship between costs and benefits.

Second, as to the cost-benefit site-specific variance, the only obstacle to reinstatement of this provision is the Second Circuit's suggestion that local weighing of costs and benefits would require permit writers to consider the quality of the receiving water. That is not persuasive for reasons explained earlier, Entergy Br. 46-49, UWAG Br. 42-57, and above, *see supra* at 15-16, 22-25. Section 316(b) is uniquely focused on issues of local "environmental impact"—including effects *on the waterbody*. *See supra* at 16. Riverkeeper now concedes that §316(b)'s language cries out for regulation tailored to local conditions. Riverkeeper Br. 32-33. *Cf. Chem. Mfrs. II*, 870 F.2d at 222 (acknowledging that fundamentally different factors variances were necessary "to ensure that the national rule [for BPT] would not be overturned simply because of the Agency's failure to consider unique plants"). It is also difficult to imagine how Riverkeeper's own *de minimis* exception could be administered without regard to local ecological conditions. A more expensive technology might have benefits that are "so minor as to be unnecessary," Riverkeeper Br. 29, in one location but not another.

Riverkeeper's suggestion (at 32 n.17) that the permissibility of *local* cost-benefit analysis is not fairly within the question presented is incorrect. The question presented embraces EPA's cost-benefit authority in determining BTA generally, and that can be performed at the national or local levels. Riverkeeper's brief eloquently demonstrates how these issues are inextricably intertwined. Its entire

argument is that weighing of costs against benefits (national or local) would be inconsistent with legislative history suggesting that Congress wanted to deemphasize consideration of waterbody characteristics. Like the meaning of "best," this issue is fully presented, essential to the lower court's reasoning and to resolving the parties' arguments, and a "'predicate to an intelligent resolution of the question presented.'" *United States v. Grubbs*, 547 U.S. 90, 94 n.1 (2006) (citation omitted); *accord supra* at 27-28.

At a minimum, even if all of respondents' arguments were accepted, the terms of the remand must be modified. Respondents conspicuously decline to defend several important aspects of the Second Circuit's reasoning, including that court's cramped "cost-effectiveness" test and its hostility to local or site-specific determinations under §316(b). *Supra* at 12-13, 29. EPA spent a decade of study in formulating the Phase II Rule. If it is forced to revisit that effort, it should not be under instructions that even respondents are now unwilling to defend.

Respectfully submitted,

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ADDENDUM

33 U.S.C. § 1312

§ 1312. Water quality related effluent limitations

(a) Establishment

Whenever, in the judgment of the Administrator or as identified under section 1314(*l*) of this title, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 1311(b)(2) of this title, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

(b) Modifications of effluent limitations

(1) Notice and hearing

Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall publish such proposed limitation and within 90 days of such publication hold a public hearing.

(2) Permits

(A) No reasonable relationship

The Administrator, with the concurrence of the State, may issue a permit which modifies the effluent limitations required by subsection (a) of this section for pollutants other than toxic pollutants if the applicant demonstrates at such hearing that (whether or not technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this chapter) from achieving such limitation.

(B) Reasonable progress

The Administrator, with the concurrence of the State, may issue a permit which modifies the effluent limitations required by subsection (a) of this section for toxic pollutants for a single period not to exceed 5 years if the applicant demonstrates to the satisfaction of the Administrator that such modified requirements (i) will represent the maximum degree of control within the economic capability of the owner and operator of the source, and (ii) will result in reasonable further progress beyond the requirements of section 1311(b)(2) of this title toward the requirements of subsection (a) of this section.

(c) Delay in application of other limitations

The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under section 1311 of this title.